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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. CHARLES A. NEWCOMB et al., Defendants and Appellants.	B203348 (Los Angeles County Super. Ct. No. KA079056)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles E. Horan, Judge. Affirmed.

Cheryl B. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant Paul Shaw.

Lynette G. Moore, under appointment by the Court of Appeal, for Defendant and Appellant Bryn Jared Anderson.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Charles A. Newcomb.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Paul Shaw, Charles Newcomb, and Bryn Jared Anderson challenge their respective convictions for cultivating marijuana at a cabinetry business on Vernon Avenue. Also, appellant Newcomb separately challenges his conviction for cultivating marijuana at a residence on Calvados Avenue and a probation condition. Below, appellants attempted to argue the application of various defenses under the Health and Safety Code. The court rejected the defenses.

Before this court they argue: (1) the court erred in precluding appellants from raising a collective, cooperative defense to the charge of cultivating marijuana at the Vernon location under Health and Safety Code section 11362.775; (2) the court erred in applying the numerical limitations in Health and Safety Code section 11362.77, because the limitations are unconstitutional; (3) the court erroneously precluded them from raising a "primary caregiver" defense to the charge of cultivating marijuana at the Vernon location because the court improperly construed the term "caregiver" as set forth in the Compassionate Use Act (Health & Safety Code, § 11362.5) and the Medical Marijuana Program (Health & Safety Code, § 11362.7 et seq.); (4) appellant Newcomb presented sufficient evidence proving that he was a primary caregiver to another person at the Calvados residence; and (5) the court abused its discretion when it imposed on appellant Newcomb a probation condition which prohibited him from using marijuana for medical purposes, because the condition was unreasonable.

As we shall explain, none of these challenges have merit, and therefore we affirm.

BACKGROUND AND PROCEDURAL HISTORY

On May 8, 2007, Detectives Chris Franks and Jason Kimes, who were investigating a marijuana-cultivating operation, went to a cabinetry business on Vernon Avenue in Azusa, in order to conduct a search. Upon arrival, Detectives Franks and Kimes arrested appellants Newcomb and Shaw. As a result of the search, Detectives Franks and Kimes found: an irrigation system, which was sustaining 716 growing marijuana plants; 25 marijuana plants, which the occupants had been drying for harvest;

containers of grow formula, fertilizer, and plant vitamins; papers, which related to using marijuana for medical purposes; a surveillance camera; a Pit Bull; and a Labrador.

On the same day, Officer Xavier Torres went to a residence on Calvados Avenue, in Azusa, in order to conduct a search, as well. In the garage, Officer Torres found three firearms, $200 in cash, two digital scales, and marijuana in several containers, which ranged from sealed clear plastic bags to medicine bottles. The garage also contained an irrigation system, which was sustaining four growing marijuana plants. At the time, appellant Newcomb had been living in the garage. Officer Torres also discovered, in the living room, various tools for growing marijuana and, in the backyard, a greenhouse in which 14 marijuana plants were growing. In the greenhouse, Office Torres also found three physician's recommendations for using medical marijuana. A resident at the house told Officer Torres that appellant Newcomb was growing marijuana and was providing it to a third resident.

Thereafter, Officer Torres interviewed appellant Newcomb, who admitted that he was aware of the grower operation at the Vernon location but asserted that he was not the main grower. He contended that appellant Shaw was the main grower at the Vernon location and that the cultivated marijuana was supplied to medical dispensaries. Appellant Newcomb also admitted that he had helped at the Vernon location but described his help as merely incidental, such as taking and dumping some of the trash.

During their investigation, Detectives Franks and Kimes connected the Vernon location with appellant Anderson's residence on Canyon Drive in Los Angeles. Because of that connection, on May 24, 2007, Detective Kimes went to the Canyon residence in order to conduct another search. Upon arrival, Detective Kimes arrested appellant Anderson. As a result of the search, Detective Kimes found $1,863 in cash, photographs of appellant Shaw at the Vernon location, a book about cultivating marijuana, and various quantities of marijuana, including two large bags of marijuana in the refrigerator.

Subsequently, Detective Kimes questioned appellant Anderson regarding his involvement with the grower operation at the Vernon location. Appellant Anderson told Detective Kimes that he was responsible for picking the Vernon location as a site to grow

marijuana and that he had affixed the surveillance cameras above the front door. Appellant Anderson further contended that he and appellant Newcomb were equal partners in the operation and that they were giving appellant Shaw marijuana for him to watch the site. Appellant Anderson also stated that he was an employee of West Hollywood Caregivers, which was a medical marijuana dispensary, and that the marijuana ultimately went to people who used it for medical purposes.

For their involvement at the Vernon location, appellants Newcomb, Shaw, and Anderson were charged in count one with a violation of Health and Safety Code section 11358, cultivating marijuana. Also, for his separate conduct at the Calvados residence, appellant Newcomb was charged in count two with a violation of Health and Safety Code section 11358, cultivating marijuana, and in count three with a violation of Health and Safety Code section 11359, possessing marijuana with the intent to sell.

At the beginning of the trial, appellants waived their right to a jury trial, and the court admitted the preliminary hearing transcript into evidence. During the course of the trial, attorneys for appellants argued that, as members of West Hollywood Patients Collective and of West Hollywood Caregivers, appellants' conduct, at the Vernon location, fell within Health and Safety Code section 11362.775 (hereinafter the "collective, cooperative defense") or, alternatively, made them caregivers (hereinafter the "caregiver defense"), providing them with a defense against the charge of cultivating marijuana at the Vernon residence. As an offer of proof, they proffered evidence that appellants were qualified patients under Health and Safety Code section 11362.7, subdivision (f), and the testimony of three witnesses.

The first witness they offered was Cleve Hall, who was the owner and operator of the West Hollywood Caregivers. According to appellants, Hall would have testified about the nature of the collective, the number of members in the collective, how the collective obtained its marijuana, the fact that the collective restricted distribution of marijuana to its members, and the fact that appellants Shaw, Newcomb, and Anderson were employees of the collective and supplied it with marijuana.

Second, they offered the testimony of Matthew Dunn, who was the director of the Hollywood Patients Collective. They averred that Dunn would have also testified about the custom and practice of this collective and the fact that appellants Shaw, Newcomb, and Anderson were employees of this collective. Moreover, appellant Anderson's attorney stated the cultivated marijuana at the Vernon location had about 7,000 eventual end users when these two collectives were combined.

Third, they offered the testimony of Chris Conrad, who was an expert witness. Conrad would have testified about the growth of marijuana, what is it used for, what the weight of the marijuana that was growing would have been as a usable amount, the importance of medical marijuana, the relationship of that amount to the number of potential end users, and how it was used throughout the world.

After hearing oral arguments and the offer of proof, the court concluded that the evidence was insufficient to establish the caretaker defense or the collective, cooperative defense. As such, the court precluded appellants from presenting the aforementioned evidence.

In addition to, and separate and apart from, the defenses concerning the Vernon location, appellant Newcomb sought to present defenses in connection with counts two and three, claiming that appellant Newcomb was a caregiver to Merkel and that, therefore, appellant Newcomb was permitted to cultivate marijuana in the quantities that he did so at the Calvados residence for his own use and for Merkel as his caregiver. Appellant Newcomb presented the testimony of Merkel in which Merkel had testified that some of the plants grown at the Calvados residence belonged to Merkel, that Newcomb grew some of those plants for Merkel, and that Newcomb had driven Merkel to the doctor. Moreover, to establish the relationship between the number of plants and appellant Newcomb and Merkel, Newcomb again offered the testimony of Conrad, which the court disallowed.

After a bench trial, the court found appellant Newcomb guilty on counts one and two, cultivating marijuana, but not guilty on count three, possessing marijuana with the intent to sell. The court also found appellants Shaw and Anderson guilty of cultivating

marijuana. The court sentenced appellant Newcomb to three years and eight months in state prison and sentenced appellants Shaw and Anderson each to three years in state prison; the court suspended those sentences and placed each person on probation for three years.

The court imposed, as part of the probation, the condition that appellants refrain from using or possessing any narcotics and from possessing drug paraphernalia, including marijuana and marijuana-growing apparatuses and equipment.

On March 18, 2008, appellant Newcomb brought a motion to modify his probation terms pursuant to Health and Safety Code section 11362.795. At the hearing, appellant Newcomb argued: that he had an eating disorder that prevents him from holding down food; that he suffered from anxiety; that he has pain in his hand; that he smokes marijuana to help him hold down the food and alleviate his anxiety and pain; and that, therefore, the court should allow appellant Newcomb to continue using marijuana. To support his argument, appellant Newcomb proffered the testimony of Dr. Michael Gitter, who testified that, in his opinion, the best treatment for appellant Newcomb's medical issues was marijuana. However, Dr. Gitter also testified that the only medication that he had recommended to appellant Newcomb for his medical issues was marijuana and that other medication that could help appellant Newcomb's medical issues may exist.

The court denied the motion, reasoning that appellant Newcomb was involved in a large scale marijuana cultivation operation, that other substances may help Newcomb's disorder, and that, for his rehabilitation, Newcomb needs to disassociate from the marijuana subculture.

Appellants filed this timely appeal.

DISCUSSION

I. *Appellants Shaw, Newcomb, and Anderson's Collective, Cooperative Defense*.

Appellants Shaw, Anderson, and Newcomb argue that the court erroneously precluded them from raising a collective, cooperative defense to the charge of cultivating

marijuana at the Vernon location. Specifically, appellants assert that at the pre-trial hearing, they proffered sufficient evidence to place their cultivation activities at the Vernon location within the ambit of Health and Safety Code section 11362.775 and that, as such, the court should have considered this defense during the bench trial. Appellants contend that the trial court precluded their defense because the court improperly construed Health and Safety Code section 11362.775.

A. ***Legal Background and Analytical Framework of the Compassionate Use Act and the Medical Marijuana Program Act.***

In 1996, California voters passed Proposition 215 (Health and Saf. Code, § 11362.5), the Compassionate Use Act. One purpose of the Compassionate Use Act was "[t]o ensure that seriously ill Californians [would] have the right to obtain and use marijuana for medical purposes . . . ." (Health & Saf. Code, § 11362.5 subd. (b)(1)(A).) However, " . . . the Compassionate Use Act is a narrowly drafted statute [which is] designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use despite the penal laws . . . ." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 772-773 (*Urziceanu*).)

Under the Compassionate Use Act, this personal use requirement means that a group of qualified patients or primary caregivers *cannot* collectively cultivate marijuana and distribute the marijuana to other qualified patients or primary caregivers; rather, a qualified patient or primary caregiver can cultivate medical marijuana only for the personal use of that qualified patient or that primary caregiver's patient. (*Urziceanu, supra,* 132 Cal.App.4th at p. 769; see e.g., *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1169 (*Galambos*); *People v. Young* (2001) 92 Cal.App.4th 229, 235–238 (*Young*); *People v. Rigo* (1999) 69 Cal.App.4th 409, 412-416 (*Rigo*); *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389-1400 (*Peron*); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1543-1551 (*Trippet*).)

Additionally, another purpose of the Compassionate Use Act was "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."

(Health & Saf. Code, § 11362.5, subd. (b)(1)(C).) To that end, in 2003, the California Legislature promulgated the Medical Marijuana Program Act. (Stats. 2003, ch. 875, § 1.)

One of the Medical Marijuana Program's stated purposes was to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1(b), p. 2.) To achieve this purpose, the Legislature included Health and Safety Code section 11362.775. "This new law represent[ed] a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers . . . ." (*Urziceanu, supra,* 132 Cal.App.4th at p. 784.) In effect, it somewhat expanded the personal use requirement concerning the cultivation of marijuana, which the Compassionate Use Act permitted.

Health and Safety Code section 11362.775 states that "[q]ualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (Health & Saf. Code, § 11362.775.) As such, the statute provides, in some circumstances, a defense for qualifying patients, persons with valid identification cards, and primary caregivers who are involved in the collective or cooperative cultivation of marijuana for medical purposes. The defense includes protection from criminal liability for the possession of marijuana, for cultivating marijuana, for the possession of marijuana for sale, for the transportation, sale, furnishing, giving away, preparing for sale or administering of marijuana, for maintaining a location for selling, giving away, serving, or using of marijuana, and for managing a location for manufacturing, storing, keeping, and distribution of marijuana for sale.

Appellants argue that, for cultivators to fall within the protections of this defense, the statute only has two requirements: the cultivators must belong to the protected class, and the marijuana must go to medical users. The Attorney General, however, responds that the statute has a much more limited scope, asserting the statute requires that the

association for collective and cooperative cultivation entail some united action or participation among all those involved and that the association be a formalized relationship.

Appellants urge this court to adopt their interpretation because it is more favorable to a criminal defendant. In support of this contention, appellants assert that *In re Tarar* (1959) 52 Cal.2d 250, and its progeny, stand for the proposition that " . . . when language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." (*In re Tarar, supra,* 52 Cal.2d at p. 256.) Although appellants have correctly recounted the rule set forth in *In re Tarar*, that rule "is subordinate to the one providing that '. . . when interpreting a statute, . . . its purpose is paramount: we "should ascertain the intent of the Legislature so as to effectuate the purpose of the law."'" (*People v. Bradely* (1983) 146 Cal.App.3d 721, 725 [quoting *People v. Davis* (1981) 29 Cal.3d 814, 828].) Here, as will be demonstrated below, the legislative purpose of the collective, cooperative defense is clear, and, as such, it must be properly effectuated. Further, we find, given the statute's grammatical structure and the enumerated sections therein, that the appellants' interpretation is not a reasonable construction of the statute; appellants' approach does not fully embrace the concept of a collective or cooperative.

The enumeration of certain activities and the grammatical structure of the statute are instructive on the nature of collectives and cooperatives that fall within the protections of Health and Safety Code section 11362.775. The section provides a defense for the following activities: the possession, cultivation, sale, transportation, furnishing, giving away, preparing, and administering of marijuana and the maintaining and managing of a location for marijuana related purposes. In affording protection for all these activities, the Legislature envisioned that the operations of the collectives and cooperatives comprised not only the cultivation and distribution of medical marijuana but also comprised these various other aspects, i.e. those which are directly related and incidental to cultivation and distribution. Therefore, an enterprise that only cultivates and

distributes marijuana to others may not fall within the protections of the collective, cooperative defense.

Furthermore, with regard to the grammatical structure of the section, the adverbs "collectively" and "cooperatively" are placed before, rather than after, the infinitive "to cultivate." This placement indicates that the adverbs "collectively" and "cooperatively" do not just modify the infinitive "to cultivate." That is to say the collective or cooperative aspect of the statute is not just related to cultivation. Instead, the collective or cooperative aspect relates to all those activities that are somehow related to the general purpose of cultivating marijuana for medical purposes. Specifically, the adverbs "collectively" and "cooperatively" modify the whole clause ". . . associate within the State of California in order [] to cultivate marijuana for medical purposes . . . ." As such, for an enterprise to be a true collective or cooperative, the members of the enterprise must collectively and cooperatively work on *all* those activities that are directly and indirectly related to cultivation.

Accordingly, to fall within the protections of Health and Safety Code section 11362.775, a criminal defendant must show, at the very least, that: (1) the defendant was a member of the collective or cooperative; (2) each member of the collective or cooperative is either a qualified patient, a person with valid identification cards, or a designated primary caregiver; and (3) the members of the collective or cooperative came together and worked on some aspect of the association that was directly or indirectly related to cultivating and distributing marijuana for medical purposes, such as cultivation, manufacturing, selling, preparing, transportation, real estate management, administration, etc. The members must make a meaningful contribution to the day-to-day activities of the collective and cooperative.

However, "[the statute's] specific itemization of the marijuana sales law indicate[s] [the Legislature] contemplate[d] the formation and operation of medical marijuana cooperatives that would receive reimbursement for marijuana and the services provided with the provision of that marijuana." (*Urziceanu*, *supra*, 132 Cal.App.4th at p. 785.) Therefore, concerning the third requirement, other than merely purchasing

marijuana, not every member must contribute to some aspect of the collective or cooperative; however, a sufficient number must do so.

In determining whether a sufficient number have contributed to the collective or cooperative, two competing concerns arise. On the one hand, the Legislature enacted Health and Safety Code section 11362.775 to enhance the access of patients to medical marijuana. Because some patients may be too ill to contribute to the collective or cooperative, requiring them to do so, in order to be part of the collective or cooperative, would be impractical. On the other hand, when the number of those who merely purchase marijuana without any contribution to the day-to-day activities of the collective or cooperative becomes too great, the potential for abuse arises. These two competing concerns must be balanced. Hence, whether a sufficient number of the members have contributed to the collective or cooperative depends on a totality of the circumstances.

B. *Burden of Proof and Production for Collective, Cooperative Defense*.

The Health and Safety Code section 11362.775 defense also presents two separate but related issues relating to proof. First, whether the prosecution or the defendant bears the burden of producing evidence regarding the facts that underlie the defense. Second, what is the quantum of proof that is necessary to prove the defense.

Appellants argue that burden of producing evidence and the burden of proof for the collective, cooperative defense are the same as the burdens for the medical marijuana patient defense, which were set forth in *People v. Mower* (2002) 28 Cal.4th 457 (*Mower*). There, the defendant was charged with possessing and cultivating marijuana in violation of Health and Safety Code sections 11357 and 11358. (*Mower, supra*, 28 Cal.4th at p. 463.) The defendant relied on Health and Safety Code section 11362.5, subdivision (d), the medical marijuana patient defense. (*Ibid.*) The statute provides that "[Health and Safety Code] section 11357, relating to the possession of marijuana, and section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." The California Supreme Court held that, for the purposes of the medical

marijuana patient defense, the burden of producing evidence was on the defendant and the burden of proof was to raise a reasonable doubt. (*Mower, supra,* 28 Cal.4th at p. 464.)

Concerning the first issue, like the burden of producing evidence for a medical marijuana patient defense, the burden of producing evidence for a collective, cooperative defense is on the defendant. In *Mower*, the California Supreme Court asserted that, if a statute does not expressly allocate any burden of proof as to the underlying facts of a defense, the so-called rule of convenience and necessity provides the answer. (*Mower, supra,* 28 Cal.4th at p. 477.) Courts often apply the rule " . . . when the 'exonerating fact' arises from an exception to a criminal statute." (*Ibid*.)

In *Mower*, the California Supreme Court found that the rule of necessity and convenience was applicable because Health and Safety Code section 11362.5, subdivision (d), "constitutes an exception" to Health and Safety Code sections 11357 and 11358. (*Mower, supra,* 28 Cal.4th at p. 477.) The California Supreme Court reasoned that it is an exception because it provides that those statutes "shall not apply" when certain requirements are met. (*Ibid*.) The same reasoning applies to Health and Safety Code section 11362.775. It constitutes an exception to certain criminal statutes, as well. It states that a defendant "shall not solely on the basis of that fact be subject to" the enumerated criminal statutes therein. (Health & Saf. Code, § 11362.775.) Because the rule of convenience and necessity applies, the analysis shifts to whether the collective, cooperative defense falls within the rule's scope.

Under the rule of convenience and necessity, a court may place the burden of producing evidence to prove the existence of an exonerating fact on the defendant if (1) the existence of the fact is peculiarly within the defendant's personal knowledge, (2) having the prosecution prove the nonexistence of the fact would be relatively difficult or inconvenient, and (3) having the defendant prove the existence of the fact would not be unduly harsh or unfair. (*Mower, supra,* 28 Cal.4th at p. 477.)

In this case, as part of the collective, cooperative defense, the information relevant to the exonerating fact is: whether the members of the collective or cooperative are

qualified patients, primary caregivers, or persons with valid identification cards; and the nature of the operation of the collective or cooperative. This information is peculiarly within defendant's person knowledge because the defendant must be a part of the collective or cooperative to raise the defense; the defendant, being part of the collective or cooperative, is better situated than the prosecution to prove the existence of the necessary facts. Furthermore, placing the burden on the defendant would not be unduly harsh or unfair. Therefore, we conclude that the defendant has the burden of producing evidence regarding the underlying facts to Health and Safety Code section 11362.775.

Given that the burden of producing evidence is on the defendant, we move to the second issue, which is the quantum of proof that is required to establish the collective, cooperative defense.

When, under the rule of convenience and necessity, a criminal defendant has the burden of producing evidence, the necessary burden of proof is equally consistent with requiring the defendant to prove the defense by raising a reasonable doubt as it is with requiring the defendant to prove the defense by a preponderance of the evidence. (*Mower, supra,* 28 Cal.4th at p. 478.) This is so because Evidence Code section 501 states that "[i]nsofar as any statute, except [Evidence Code] Section 522, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096." (Evid. Code, § 501.) Penal Code section 1096 requires that the prosecution prove the facts establishing a defendant's guilt beyond a reasonable doubt. In contrast, Evidence Code section 522 requires that a defendant prove the facts underlying a defense of insanity by a preponderance of the evidence.

Therefore, unless a statute indicates otherwise, the defendant only needs to raise a reasonable doubt concerning the underlying facts of the defense if the defense relates to the criminal defendant's guilt or innocence. (*Mower, supra*, 28 Cal.4th at p. 479.) The defense relates to the defendant's guilt or innocence if it " . . . relate[s] to an element of the crime in question." (*Id*. at p. 480.) However, if the defense is collateral to the defendant's guilt or innocence, the defendant has to prove the underlying facts of the defense by a preponderance of the evidence. (*Ibid*.) The defense is collateral to

defendant's guilt or innocence if it is " . . . collateral to any element of the crime in question." (*Ibid*.) In *Mower*, the California Supreme Court held that the medical marijuana patient defense requires that the defendant merely raise a reasonable doubt.

Relying on *Mower*, here, appellants argue that the collective, cooperative defense requires that the defendant merely raise a reasonable doubt. However, *Mower* is distinguishable. There, the California Supreme Court's ultimate conclusion was that " . . . the defense provided by [Health and Safety Code] section 11362.5[, subdivision] (d) relates to the defendant's guilt or innocence, because it relates to an element of the crime of possession or cultivation of marijuana." (*Mower, supra*, 28 Cal.4th at p. 482.) The Supreme Court listed several factors that supported its conclusion. None of those factors are applicable to the collective, cooperative defense.

First, the California Supreme Court compared the medical marijuana patient defense to other defenses under which the defendant is required merely to raise a reasonable doubt. The California Supreme Court noted that "[m]ost similar is the defense of possession of a dangerous or restricted drug with a physician's prescription, against a charge of unlawful possession of such a drug [in which a defendant need only raise a reasonable doubt as to his or her possession of the drug in question with a physician's prescription]." (*Mower, supra,* 28 Cal.4th at p. 481.) However, for the collective, cooperative defense, the defendant must assert that he or she is a member of a cooperative or a collective, which is nothing like that which the defendant must prove in order to raise a defense of possession of a dangerous or restricted drug with a physician's prescription.

Next, the California Supreme Court examined the purpose of the defense that Health and Safety Code section 11362.5 provides. It noted the purpose of Health and Safety Code section 11362.5, which is partly "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (Health and Saf. Code, § 11362.5, subd. (b)(1)(B).) In contrast, the purpose of Health and Safety Code section 11362.775 is not explicitly to exempt people from criminal prosecution or

sanction. Rather, the purpose is to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1(b), p. 2.)

Additionally, the California Supreme Court stated that under Health and Safety Code section 11362.5, defendants were exempted not only from criminal sanction for possession and cultivation of marijuana but even from criminal prosecution. (*Mower, supra*, 28 Cal.4th at p. 482.) Conversely, Health and Safety Code section 11362.775 only provides protection from criminal sanction and not from criminal prosecution.

Lastly, the California Supreme Court found that, "[i]nasmuch as this statute provides that [Health and Safety Code] sections 11357 and 11358, which criminalize the possession and cultivation of marijuana, 'shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' ([Health and Saf. Code] § 11362.5(d)), the provision renders possession and cultivation of marijuana noncriminal under the conditions specified." (*Mower, supra*, 28 Cal.4th at p. 482.) The California Supreme Court further noted that " . . . this defense negates the element of the possession or cultivation of marijuana to the extent that the element requires that such possession or cultivation be unlawful." (*Ibid*.)

Dissimilarly, the collective, cultivation defense does not negate the elements of the crimes, which Health and Safety Code section 11362.775 recites, to the extent that those crimes require its elements be unlawful. Rather, the extent of Health and Safety Code section 11362.775 is limited to a single factual scenario, the exonerating fact. It states that a defendant "shall not *solely on the basis of that fact* be subject to" the criminal statutes. (Health and Saf. Code, § 11362.775; italics added.) As such, the elements of the crimes for which it provides protection can still be unlawful where the prosecution can show a factual scenario in addition to the factual scenario that the statute recites. In other words, under Health and Safety Code section 11362.775, a defendant shall not *solely on the basis of the exonerating fact* be subject to the criminal statutes; however, a defendant may be subject to the criminal statutes where, in addition to the exonerating

fact, the charge includes other incriminating facts. Therefore, the collective, cooperative defense is not a blanket defense that negates the elements of the crimes for which it provides protection.

In addition, we conclude that the preponderance of the evidence standard applies because the exonerating facts of the collective cooperative defense are collateral to the elements of the crime for which the defense provides protection. That is to say that the collective, cooperative defense does not establish the defendant's guilt or innocence; rather, the defense is tangential to it.

Generally, a defense is collateral to a defendant's guilt or innocence where the elements necessary to prove the defense have no bearing on the defendant's conduct. (*Mower, supra,* 28 Cal.4th at pp. 481-482.) The focus of the analysis for such defenses are on the conduct of others, which, when established, provides the defense. (*Ibid*.) As is the case with the collective, cooperative defense, the conduct of people other than the defendant is what establishes the defense.[1]

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[1] Additionally, courts have oftentimes looked to the policy reasons for adopting the defense to determine whether the defense is collateral to a defendant's guilt or innocence. (see e.g. *People v. Valverde* (1966) 246 Cal.App.2d 318 (*Valverde*) [cited approvingly in *People v. Moran* (1970) 1 Cal.3d 755, 760 (*Moran*)].) For example, in *Valverde*, the Court of Appeal, Fifth Appellate District, held that the defendant has the burden of proving entrapment by a preponderance of the evidence. (*Valverde, supra,* 246 Cal.App.2d 318.) To support its holding, the court found that entrapment does not go to the question of guilt or innocence. (*Id.* at p. 322.) The court looked at two aspects of the entrapment defense in making its finding. (*Id*. at pp. 322-324.) First, the court noted the policy reasons for why the courts have adopted the entrapment defense. The court averred that "'[i]n California recognition of the defense is said to rest upon the broadly stated grounds of "sound public policy" and "good morals."'" (*Id*. at pp. 322-323, quoting *People v. Benford* (1959) 53 Cal.2d 1, 8-10.) The court went on to state that the policy is not to decriminalize certain crimes but is to "'. . . refuse[] to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime.'" (*Ibid*.) Second, the court noted the nature of the entrapment defense itself. The court found that "' . . . the tests and definitions of entrapment stated by the California courts, like those stated by the United States Supreme Court, place at least as much emphasis on the susceptibility of the defendant as on the propriety of the methods of the police.'" (*Ibid*.) Like the entrapment defense, the collective, cooperative defense does not rest on the decriminalization of certain crimes but instead rests on public policy.

Because the burden of producing evidence is on the defendant and the burden of proof is by a preponderance of the evidence, the defendant must satisfy these burdens. This means that, in cases where the moving party is asserting a defense, the moving party needs to introduce some admissible evidence that is within the ambit of the defense.

Therefore, with regard to a collective, cooperative defense, in order for a defendant to satisfy this initial burden of proof, the defendant must offer evidence so that the trier may have a reasonable basis for concluding that the defendant has met the elements of Health and Safety Code section 11362.775. That is to say that the defendant must introduce evidence to support a finding that: (1) the defendant was a member of the collective or cooperative; (2) each member of the collective or cooperative is either a qualified patient, a persons with valid identification cards, or a designated primary caregiver; and (3) the members of the collective or cooperative came together and worked on some aspect of the association that was directly or indirectly related to cultivating and distributing marijuana for medical purposes.

As an example, in *Urziceanu*, after making an offer of proof, the trial court precluded the defendant from raising a collective, cooperative defense. (*Urziceanu, supra,* 132 Cal.App.4th at p. 782.) The Court of Appeal, Third Appellate District, reversed the trial court's determination and held that " . . . [the] defendant [had] produced substantial evidence that suggests he would fall within the purview of [Health and Saf. Code] section 11362.775." (*Id.* at p. 786.) The court asserted that the defendant had presented the trial court with evidence that: the defendant was a qualified patient; the

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The intent of the Legislature, in passing Health and Safety Code section 11362.775, was to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875, § 1(b), p. 2.) Moreover, the entrapment defense and the collective, cooperative defense are analogous with respect to how one must analyze them. Similar to the emphasis of the analysis under the entrapment defense, which is on the defendant as well as the police, the emphasis of the analysis under the collective, cooperative defense is on the defendant as well as on the other members of the collective or cooperative and the nature of the collective or cooperative as a whole. Furthermore, the analysis rests as much on the nature of the collective or cooperative and on the other members than the particular conduct of the defendant.

co-defendants were qualified patients; the procedures of the collective, in question, verified the prescriptions and identities of the various members, making them qualified patients, as well; members paid membership fees and reimbursed the defendant for cost incurred in the cultivation through donations; and members volunteered and participated at the collective, by helping with cultivation, delivery, processing of new applications, etc. (*Ibid.*)

C. *Evidence Appellants Presented to Prove Their Collective, Cooperative Defense*.

Appellants' offer of evidence was insufficient to place them within the purview of Health and Safety Code section 11362.775. Although Appellants offered evidence that they were qualified patients and claimed they could show that the other 7,000 members of the West Hollywood Patients Collective and West Hollywood Caregivers were qualified patients, they fail to meet the third requirement, which is that the members of West Hollywood Patients Collective and West Hollywood Caregivers came together and worked on some aspect indirectly or directly related to cultivating and distributing marijuana for medical purposes.

First, unlike the evidence that the defendant in *Urziceanu* offered, here, the evidence that appellants offered did not establish that any of other members in the two collectives volunteered or participated at the collectives, by helping with cultivation, delivery, processing of new application or anything else to further the aims of the collective and cooperative.

Moreover, appellants' offers of proof provided that Hall and Dunn would testify as to the number of members in the collectives, how the collectives obtained their marijuana, the fact that the collectives restricted distribution of marijuana to their members, and the fact that appellants were employees of the collectives and supplied it with marijuana. This offer of proof, however, is not sufficient to prove the involvement of the other 7,000 members of the collectives or that they did anything that constituted collective, cooperative type work. The only inferences that one can reasonably draw from this offer is that appellants cultivated marijuana and somehow distributed it to 7,000

qualified patients. Therefore, the nature of the collectives was such that three members cultivated marijuana and distributed that marijuana to the 7,000 other members.

Further, it is clear that a ratio of three members who conduct the day-to-day work of the collective or cooperative versus 7,000 members who merely purchase marijuana far exceeds what the Legislature had envisioned when it enacted Health and Safety Code section 11362.775. With such a ratio, the balance of the concern overwhelmingly tips in favor of curbing potential abuse. When the ratio is 7,000-to-3, the relationships between the various members become too attenuated, and the potential for abuse becomes too great;[2] it clearly outweighs any public benefit in providing access for medical marijuana.

Accordingly, appellants raised insufficient evidence for the trier to have a reasonable basis for concluding that appellants had met the elements of Health and Safety Code section 11362.775. Thus, we conclude the court did not err in precluding appellant from relying on this defense at trial.

II. ***Appellants Shaw, Newcomb, and Anderson's Medical Marijuana "Patient Defense".***

Appellants Shaw, Anderson, and Newcomb also claim the trial court's holding that appellants are guilty of cultivating marijuana at the Vernon location residence was an error on the basis that, as medical marijuana patients, the amount of marijuana that appellants had cultivate at the Vernon location was not in excess of the law. Similarly, as a separate and distinct argument, appellant Newcomb also contends that the trial court's holding that appellant Newcomb was guilty of cultivating marijuana at the Calvados residence was an error because the amount of marijuana that appellant Newcomb had

[2] We reach no conclusion as to the minimum number of members that the statute requires to participate actively in the collective or cooperative in order to trigger the defense. But, in our view, it must be something more than three active members and 7,000 passive members whose only involvement is purchasing the marijuana.

cultivated at the Calvados residence was not in excess of what the law permitted for his "personal use."

Concerning such quantity limitations, a medical marijuana patient, under Health and Safety Code section 11362.5, subdivision (d), is entitled to cultivate marijuana for their personal medical purposes. On the basis of this statute, appellants argue that the cultivation of the 741 plants at the Vernon location and the cultivation of 18 marijuana plants at the Calvados residence were lawful. Appellants also contend that, although Health and Safety Code section 11362.77 states that "[a] qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient . . . [and] no more than six mature or 12 immature marijuana plants per qualified patient," the statute does not apply, because it is unconstitutional.

However, before we discuss the merits of these arguments, as a preliminary matter, we must address the issue of forfeiture. Our review of the record indicates that appellants failed to challenge the constitutionality of the numerical limits in Health and Safety Code section 11362.77 in the trial court. Ordinarily we will not consider procedural defects or erroneous rulings where an objection could have been, but was not, presented to the lower court by some appropriate method. Nonetheless, an appellate court will entertain new arguments on appeal if the new arguments rest on new authority that the appellant could not fairly be expected to anticipate. (*Guardianship of Stephen G.* (1995) 40 Cal.App.4th 1418, 1422-1423; see, e.g., *People v. Turner* (1990) 50 Cal.3d 668, 703 [point not waived "when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change"]; *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 20 [barring point on appeal would have "unfairly penalize[d]" appellant for a "lack of extrasensory perception"].)

Here, in support of their contention that Health and Safety Code section 11362.77 is unconstitutional, appellants rely on *People v. Kelly* (S164830) review granted Aug. 13, 2008 and *People v. Phophakdy* (S166565) review granted Feb. 7, 2007. Both cases held that the quantity limitations on the number of marijuana plants that a medical marijuana patient can possess under Health and Safety Code section 11362.77 are unconstitutional.

Because *People v. Kelly* (S164830) and *People v. Phophakdy* (S166565) were decided after the trial court had rendered judgment, the two cases constitute new authority. Hence, precluding appellants from raising this defense would be unfair, since appellants could not have anticipated this new case law.

Nonetheless, we need not decide here whether we agree with the analysis and conclusions in *People v. Kelly* (S164830) and *People v. Phophakdy* (S166565). As we shall explain, even assuming the Supreme Court affirms those decisions and finds the numerical limits unconstitutional, we would still affirm.

A. *Cultivation at the Vernon Location*.

The basis of the trial court's holding that appellants were guilty of cultivating marijuana at the Vernon location was that the amount of marijuana was beyond that which Health and Safety Code section 11362.77 permits a medical marijuana patient to possess and cultivate. Appellants contend that, if this numerical limitation is unconstitutional, then no limitation exists as to the amount of marijuana that they could have cultivated. Health and Safety Code section 11362.77 is part of the Medical Marijuana Program. Before the Legislature enacted the Medical Marijuana Program, in 2003, the only relevant section as to how much marijuana a medical marijuana patient could possess or cultivate was Health and Safety Code section 11362.5, subdivision (d), which is part of the Compassionate Use Act. Therefore, if we are to assume that Health and Safety Code section 11362.77 is unconstitutional, then the relevant law on the issue of whether the number of plants at the Vernon location was too much, would be Health and Safety Code section 11362.5, subdivision (d), and the case law that interprets that statute.

Health and Safety Code section 11362.5, subdivision (d), states that "[Health and Safety Code] Section 11357, relating to the possession of marijuana, and [Health and Safety Code] Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the *personal medical purposes* of the patient upon the written or oral recommendation or approval of a physician." (Italics added.)

Although the only qualification regarding the amount of marijuana that a medical marijuana patient can possess or cultivate, under Health and Safety Code section 11362.5, is that the marijuana be for the "personal medical purposes" of the patient, the case law has interpreted that qualification to mean a "reasonable amount." More specifically, " . . . the quantity possessed by the patient or the primary caregiver, and the form and manner in which it is possessed, should be reasonably related to the patient's current medical needs. What precisely are the 'patient's current medical needs' [is], of course, [] a factual question to be determined by the trier of fact. One (but not necessarily the only) type of evidence relevant to such a determination would be the recommending or approving physician's opinion regarding the frequency and amount of the dosage the patient needs." (*Trippet, supra,* 56 Cal.App.4th at p. 1549.)

We recognize that factual determinations are largely the providence of the trier of fact. We also acknowledge that reasonable minds may differ as to what a patient's current medical needs are and whether a certain quantity is reasonably related to those needs. However, we find that the amount of marijuana appellants possessed at the Vernon address--741 marijuana plants--far exceeds what three people could reasonably require. Indeed, appellants' claim that they were part of a collective, cooperative undermines any claim that three people would need 741 plants for their personal medical needs. Concerning the collective, cooperative defense, appellants argued that the 741 plants were for the 7,000 members of West Hollywood Patients Collective and West Hollywood Caregivers. It is hard to imagine how a number of plants sufficient for 7,000 medical marijuana patients could also be reasonably related to medical needs of just three medical marijuana patients.

However, even if we assume that the 741 marijuana plants might be reasonably related to their individual medical needs, appellants' argument fails because appellants have already asserted that appellants had cultivated the plants for the other 7,000 members. Since appellants already have averred that the purpose of the cultivation operation was to supply West Hollywood Patients Collective and West Hollywood Caregivers, such an assertion bars appellants from further arguing that they were entitled

to cultivate the 741 marijuana plants for their own personal medical needs. Therefore, appellants' medical marijuana patient defense must fail.

B. *Cultivation at the Calvados Residence*.

Turning to the issue of cultivation at the Calvados residence, appellant Newcomb asserts that trial court's holding that appellant Newcomb is guilty of cultivating marijuana at the Calvados residence is erroneous on the basis that the quantity limitations in Health and Safety Code section 11362.77 are unconstitutional. We disagree. The record does not indicate that appellant Newcomb denied that he had cultivated the marijuana at the Calvados residence. On the basis of such a record, it appears that he alone cultivated the marijuana at the Calvados residence; that he used it; and that he provided it to two other people. Because appellant Newcomb has specifically asserted, as part of his caregiver defense, that the people living at, and coming to, the Calvados residence shared the marijuana that appellant Newcomb had cultivated there, the cultivated marijuana was not solely for appellant Newcomb's personal medical needs. Appellant Newcomb's conduct in cultivating the marijuana at this residence for himself and others is wholly inconsistent with the medical marijuana patient defense in Health and Safety Code section 11362.5, subdivision (d). Thus, even absent the numerical limitations (in Health and Safety Code section 11362.77) the court would have nonetheless been justified in rejecting the application of the medical marijuana patient defense.

Consequently, any reliance by the court on the numerical limits in Health and Safety Code section 11362.77 is harmless error.

III. *Appellant Shaw's Caregiver Defense*.

Appellant Shaw argues that the court erroneously precluded appellants from raising a caregiver defense to the charge of cultivating marijuana at the Vernon location. Appellant Shaw asserts that the Medical Marijuana Program (Health & Safety Code, § 11362.7 et seq.), has expanded the definition of a primary caregiver and has also expanded the caregiver defense. Appellant Shaw further contends that appellants'

relationship with the West Hollywood Patients Collective and West Hollywood Caregivers qualifies appellants as primary caregivers and that the caregiver defense encompasses the appellants' cultivation operation at the Vernon location. Appellant Shaw reasons that this court should reverse the trial court's judgment since the People made no showing that the marijuana at the Vernon location was for an insufficient number of qualified patients or caretakers.

However, as we shall explain, appellant Shaw's argument fails because appellants' relationship with West Hollywood Patients Collective and West Hollywood Caregivers does not qualify them as primary caregivers and also because appellants, and not the respondent, should bear the burden of establishing the caregiver defense.

A. *The Primary Caregiver Defense under The Medical Marijuana Program*.

Appellants' relationship with West Hollywood Patients Collective and West Hollywood Caregivers does not fit within the definition of a primary caregiver under the Medical Marijuana Program.

As noted above, the purpose of the Compassionate Use Act is "[t]o ensure that seriously ill Californians [would] have the right to obtain and use marijuana for medical purposes . . .". (Health & Saf. Code, § 11362.5 subd. (b)(1)(A).) However, ". . . the Compassionate Use Act is a narrowly drafted statute [which is] designed to allow a qualified patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use despite the penal laws . . . ." (*Urziceanu, supra,* 132 Cal.App.4th at pp. 772-773.) The Medical Marijuana Program's stated purposes were to: "(1) Clarify the scope of the application of the [Compassionate Use Act] and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers. [¶] (2) Promote uniform and consistent application of the [Compassionate Use Act] among the counties within the state. [¶] (3) Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats.2003, ch. 875, § 1(b), p. 2.)

Appellant Shaw contends that, given these legislative purposes, under the Medical Marijuana Program, appellants' relationship with West Hollywood Patients Collective and West Hollywood Caregivers qualifies them as primary caregivers. We disagree. Although the Medical Marijuana Act modified the definition of what constitutes a primary caregiver, this new definition is not as expansive as appellant Shaw contends.

The Medical Marijuana Program starts with the same definition of a "primary caregiver" that is within the Compassionate Use Act: " . . . [any] individual designated by a person exempted under this section who has consistently assumed responsibility of the housing, health, or safety of that person . . . ." (Health & Safety Code, § 11362.7 subd. (d).) After giving this general description, the subdivision provides three examples of what constitutes a primary caregiver, which are not found in the Compassionate Use Act. We address the general description of a primary caregiver and the three examples in turn.

The general description of a primary caregiver, found in both the Compassionate Use Act and the Medical Marijuana Program, has two parts: an individual is the primary caregiver of a medical marijuana patient if: (1) the medical marijuana patient has designated the individual as such; and (2) the individual has consistently assumed responsibility for the housing, health, or safety of the medical marijuana patient. (*People v. Mentch* (2008) 45 Cal.4th 274, 283 (*Mentch*).) Furthermore, ". . . a defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana." (*Ibid.*)

In the case at bar, appellant Shaw failed to prove even one element of the general caregiver definition. Although appellants offered the testimony of Hall and Dunn to establish the procedure at West Hollywood Patients Collective and West Hollywood Caregivers, as a matter of law, the offer was not sufficient to prove that appellants were caregivers. Appellants made no showing, nor did they assert, that the 7,000 members of these two establishments had designated appellants or the establishments as primary caregivers. Moreover, appellants made no showing, nor can it be deduced from the

record, that appellants consistently assumed responsibility of the housing, health, or safety of 7,000 people whom appellants never met. In fact, the record only shows appellants cultivated marijuana at the Vernon residence, had the marijuana transported to the West Hollywood Patients Collective and West Hollywood Caregivers, which, in turn, distributed the marijuana to others. Additionally, appellants made no showing that they provided any caregiving independent of any assistance in taking medical marijuana. Having failed to meet this general definition of a caregiver, we look to the examples of caregivers contained in Health and Safety Code section 11362.7, subdivision (d). However, appellants' relationship with West Hollywood Patients Collective and West Hollywood Caregivers does not fit any of these three examples, either.

Concerning the first example, the statute provides that the definition of a primary caregiver includes, "[i]n any case in which a qualified patient or person with an identification card receives medical care or supportive services, or both, from a clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2, a health care facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, a residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 (commencing with Section 1568.01) of Division 2, a residential care facility for the elderly licensed pursuant to Chapter 3.2 (commencing with Section 1569) of Division 2, a hospice, or a home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2, the owner or operator, or no more than three employees who are designated by the owner or operator, of the clinic, facility, hospice, or home health agency, if designated as a primary caregiver by that qualified patient or person with an identification card." (Health & Saf. Code, § 11362.7, subd. (d)(1).) With regard to this example, appellants made no offer of proof that the 7,000 members of the Hollywood Patients Collective and West Hollywood Caregivers received medical care or supportive services. Also, appellants did not proffer any evidence that Hollywood Patients Collective and West Hollywood Caregivers was either a clinic, a health care facility, a residential care facility for persons with chronic life-threatening illness, a residential care facility, a hospice, or a home health agency that was duly

licensed. Appellants, as well, did not offer any evidence that the 7,000 members had designated anyone as primary caregivers. Therefore, appellants do not qualify as primary caregivers under this example.

As its second example, the statute provides that the definition of a primary caregiver includes "[a]n individual who has been designated as a primary caregiver by more than one qualified patient or person with an identification card, if every qualified patient or person with an identification card who has designated that individual as a primary caregiver resides in the same city or county as the primary caregiver." (Health & Saf. Code, § 11362.7, subd. (d)(2).) Appellants are not caregivers under this definition either because they offered no evidence that the 7,000 members had designated them as caregivers and they made no showing that the 7,000 members resided in the same city or county that they did.

The last example states that the definition of a primary caregiver includes "[a]n individual who has been designated as a primary caregiver by a qualified patient or person with an identification card who resides in a city or county other than that of the primary caregiver, if the individual has not been designated as a primary caregiver by any other qualified patient or person with an identification card." (Health & Saf. Code, § 11362.7, subd. (d)(3).) This example does not encompass appellants' operation, as well, because, for it to apply, the primary caregiver can only give care to one medical marijuana patient. Here, appellants assert that they are caregivers for 7,000 people.

Additionally, we reject appellant Shaw's request to construe broadly the definition of caregivers in order to include the members of a collective or cooperative. Notwithstanding the language in Health and Safety Code section 11362.7, subdivision (d), which states that a primary caregiver ". . . may include any of the following . . ." appellant Shaw suggests that the use of the phrase "may include" tends to indicate that the examples are not inclusive of all types of primary caregivers; that is other types of primary caregivers that are consistent with the statutory language and purpose of the Medical Marijuana Program might exist. While appellant Shaw is most certainly correct, we need not explore the various species of "primary giver" to which this statute may

apply to resolve this matter. Given its statutory scheme, it is clear that neither a collective nor a cooperative is a type or an example of a primary caregiver that emanates from the Medical Marijuana Program.

Membership in a collective or cooperative does not, on the basis of that fact alone, qualify one as a primary caregiver because Health and Safety Code section 11362.775 provides a separate defense for collectives and cooperatives, and their members; this defense is independent from the caregiver defense, which is in Health and Safety Code section 11362.7, subdivision (d). The Legislature having created a separate defense for collectives and cooperatives certainly did not intend the caregiver defense to encompass collectives and cooperatives.[3]

However, assuming appellants' relationship with the West Hollywood Patients Collective and West Hollywood Caregivers qualified them as some amorphous type of caregivers, the Medical Marijuana Program does not expand the scope of the Compassionate Use Act to include the broad type of defense that appellant Shaw asserts.

Appellant Shaw argues that the Medical Marijuana Program has expanded the scope of the caregiver defense to allow a primary caregiver to transport, process, administer, deliver, or give away medical marijuana to qualified patients. Even though the Medical Marijuana Program has expanded the scope of the Compassionate Use Act beyond the qualified defenses to cultivation and possession of marijuana, the expansion is not quite as broad as this.

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[3] Also, we note that the contention that the members of a collective or cooperative automatically become primary caregivers for the other members of the collective or cooperative is contrary to the general purpose of a primary caregiver. Being a primary caregiver requires that the primary caregiver assumes the responsibility of the housing, health, or safety of a medical marijuana patient. Therefore, the definition of a primary caregiver includes a caregiver-patient relationship between at least two people. If all members of a collective or cooperative are deemed primary caregivers for each other, then, *ipso facto*, they must also be each other's patients. But, in a caregiver-patient relationship, one cannot simultaneously be the caregiver and also be the patient of another. In our view, the roles of a caregiver and the role of a patient are mutually exclusive. Hence, the basic nature of a caregiver-patient relationship precludes finding that all the members of a collective or cooperative are primary caregivers of one another.

Health and Safety Code section 11362.765, subdivision (b)(2) sets forth the expanded defense for a primary caregiver under the Medical Marijuana Program. It provides an additional defense for ". . . a designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, . . . *only* to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver." (Italics added.) By using the word "only," the statute has expressly limited the scope of the defense to situations in which the recipient of the caregiver's services is the caregiver's qualified patient or a person with an identification card who has designated the caregiver. Clearly, the Legislature did not intend to grant a general defense to a caregiver who gives *any* qualified patient medical marijuana. A primary caregiver's defense for transporting, processing, administering, delivering, or giving away marijuana is applicable only if the caregiver and the particular qualified patient have an established caregiving relationship. So, even if we are to assume that appellants were some type of amorphous caregiving unit, the record fails to show that the 7,000 eventual end users had any type of caregiving relationship with appellants, making appellants ineligible for the protections afforded under Health and Safety Code section 11362.765 subdivision (b)(2).

B. *The Burden of Persuasion and Proof for The Primary Caregiver Defense*.

Appellant Shaw's argument that the People made no showing that the marijuana at the Vernon location was for an insufficient number of qualified patients or caretakers to account for the quantity is erroneous. The defendant has the burden of proving the underlying facts to a Medical Marijuana defense, and the defendant must raise a reasonable doubt as to those facts. (*Mower, supra,* 28 Cal.4th at p. 464 [concerning the burden of persuasion and the burden of proof with regard to the qualified patient defense].) Therefore, for an instruction on the caregiver defense, the defendant must produce sufficient evidence to raise a reasonable doubt as to whether he was a caregiver. (*People v. Jones* (2003) 112 Cal.App.4th 341, 349.) If the defendant fails to produce sufficient evidence to raise a reasonable doubt that he or she is a caregiver, the trial court is justified in rejecting the defense. (*Ibid.*)

The burden being on appellants to proffer sufficient evidence that proves they were caregivers, appellant Shaw's contention that the People made no showing is unsound. Moreover, as explained above, appellant Shaw failed to carry this burden, and, thus, the court properly rejected this defense.

IV. ***Appellant Newcomb's Caregiver Defense.***

Separate and apart from the challenge of cultivating marijuana at the Vernon location, appellant Newcomb also argues that the record contains insufficient evidence to sustain the court's holding that appellant Newcomb illegally cultivated marijuana at the Calvados residence. Appellant Newcomb asserts that he presented sufficient evidence proving that appellant Newcomb was a primary caregiver to Merkel and, therefore, the number of marijuana plants was not in excess of the law. We disagree.

The record contains substantial evidence that supports the trial court's determination that appellant Newcomb's relationship with Merkel did not rise to the level of a primary caregiver-patient relationship.[4] Based on the evidence that appellant Newcomb presented at trial, the court could have reasonably concluded that appellant Newcomb did not consistently assume responsibility for the housing, health, or safety of Merkel. At trial, appellant Newcomb offered the testimony of Merkel, who testified that, in addition to helping Merkel cultivate marijuana, appellant Newcomb also took Merkel to see the doctor. "The words the statute uses—housing, health, safety—imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need." (*Mentch, supra,* 45 Cal.4th at p. 286.)

In our view, merely driving someone to the doctor is not activity directed at one's core survival needs. Another reason why taking someone to see the doctor does not

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[4] Whether an individual is a caregiver is a question of fact that an appellate court reviews under the standard of substantial evidence. (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

qualify under the statute is that " . . . one must be a 'primary'—principal, lead, central—'caregiver'—one responsible for rendering assistance in the provision of daily life necessities—for a qualifying seriously or terminally ill patient." (*Ibid.*) That definition does not apply to this case. Additionally, the fact that appellant Newcomb *had* taken Merkel to the doctor does not meet the standard of *consistently*. Merkel's testimony is indefinite with regard to how many times appellant Newcomb had taken Merkel to the doctor. Based on such testimony, the court could have reasonably concluded that appellant Newcomb's taking Merkel to the doctor was an irregular event, whereas the statue requires consistency, which means a fixed or regular occurrence.

In view of the foregoing, the court properly rejected appellant Newcomb's primary caregiver defense.

V. ***Appellant Newcomb's Probation Condition*.**

Appellant Newcomb argues the court abused its discretion in imposing a probation condition that required him to refrain from using or possessing any narcotics and from possessing drug paraphernalia, including marijuana and marijuana-growing apparatuses and equipment. After the trial, appellant Newcomb brought a motion to modify his probation terms pursuant to Health and Safety Code section 11362.795, asserting that the court should allow him to use marijuana to treat his various ailments. However, the court denied the motion, finding that appellant Newcomb was involved in a large scale marijuana cultivation operation, that other substances may help his disorders, and that, for his complete rehabilitation, appellant Newcomb needed to disassociate from the marijuana subculture.

"The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. (Pen. Code, § 1203 et seq.) A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct

which is not reasonably related to future criminality . . . .' (*People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.) Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent* (1975) 15 Cal. 3d 481, 486 (*Lent*).)

In light of these principles, we first determine the threshold question of whether the probation condition is itself criminal. Then, only upon finding that it is not criminal may we strike the condition. Further, the condition can be stricken only if (1) it has no relationship to the crime of cultivating marijuana and (2) it requires or forbids conduct, which is not reasonably related to appellant Newcomb's future criminality. If either of these elements cannot be met, then the condition must stand.

The threshold question of whether a probation condition relates to conduct which is not itself criminal is a question of law, which an appellate court reviews de novo. Specifically, the issue here is whether or not the use of marijuana for medical purposes is criminal. In *People v. Blanco* (2001) 93 Cal.App.4th 748 the court held that the use of marijuana, even for medical purposes, is criminal conduct. (*People v. Blanco* (2001) 93 Cal.App.4th 748, 753-754 (*Blanco*).) The court reasoned that "[t]he possession of marijuana is a crime under the laws of the United States;" and that, therefore, "[e]ven though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law under the [Controlled Substances Act]." (*Id*. at p. 754.) In view of *Blanco*, we are disinclined to modify the probation order. However, even if we were to analyze the probation condition solely based on California laws, appellant Newcomb's argument still fails because appellant Newcomb cannot satisfy the other two elements.

The first element cannot be met because the condition is directly related to appellant Newcomb's criminal conviction. As the court noted, appellant Newcomb's involvement with a large-scale marijuana cultivation operation led to his felony cultivation conviction. The probation condition prohibits the use and possession of the same substance. (*Blanco, supra,* 93 Cal.App.4th at p. 754.) Thus, the court's conclusion

that appellant Newcomb's use of marijuana for medical purpose has a relationship to his criminality is within the bounds of reason. Further, the court in *Blanco* arrived at the same conclusion based upon the fact that the defendant in that case was convicted of cultivating marijuana and sought to strike a similar probation order. (*Ibid*.) Therefore, the condition in the probation must stand.

However, regardless of the relationship between using marijuana and cultivation, the probation condition must stand because the second element cannot be met, as well. The condition forbids conduct, which is reasonably related to appellant's future criminality. The trial court noted that appellant Newcomb was convicted of a felony crime because he illegally cultivated marijuana and that the primary goal of those with whom he was associating was to cultivate, distribute, and use marijuana. The court reasoned that, because of this, part of appellant Newcomb's rehabilitation necessitates that he disassociate from the marijuana subculture.

The court further contemplated that only after appellant Newcomb completely disassociated from the marijuana subculture would it be likely that he will not commit crimes in the future. For appellant Newcomb, the marijuana subculture included using marijuana even for medical purposes, since he failed to show that other substances would not help him with his disorders. The court's conclusion as such was, therefore, neither arbitrary nor capricious.

Appellant Newcomb also appears to contend that in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433 (*Tilehkooh*), the court held that a probation condition, which prohibited the lawful use of a prescription drug, did not serve a rehabilitative purpose. However, *Tilehkooh* does not stand for such a rigid proposition. In *Tilehkooh*, the court asserted that "it ordinarily cannot be said that the treatment of an illness by lawful means is [reasonably related to the crime of which the defendant was convicted or to the defendant's future criminality]." (*Id*. at p. 1444; italics added.) As a general rule, the prohibition of such treatment is not reasonably related. However, if the defendant had abused or misused the treatment, and other treatments are potentially available, a trial judge is well within his discretion to limit the treatment or preclude its use all together.

In *Tilehkooh*, the court noted that the reason the defendant was placed on supervised probation was for maintaining a place for the use of a controlled substance and that the record failed to convey what were the circumstances of the offense. (*Id*. at p. 1438.) Here, by contrast, the record clearly indicates the circumstances of the offense and the exact substance with which appellant Newcomb was involved. Further, the trial court articulated a well-reasoned summary of the facts and circumstances that led to the probation order. Although Health and Safety Code section 11362.5 made marijuana a viable treatment option for certain ailments, that did not completely abrogate the trial court's discretion when placing conditions on a probation order. In view of the foregoing, we conclude that the trial court did not abuse its discretion when it imposed this probation condition.

DISPOSITION

The judgment is affirmed.

WOODS, Acting P. J.

I concur:

JACKSON, J.

ZELON, J., Dissenting.

I respectfully dissent.

In reaching the conclusion that the trial court properly precluded appellants from presenting a collective cooperative defense in this case, the majority creates a new test for that defense. Because I believe that test imposes requirements neither found in the language of the statute, nor consistent with the express intent of the Legislature, I respectfully dissent and would reverse on that ground. In addition, with respect to appellant Newcomb, I would find that the imposition of a probation condition depriving him of the ability to use the medical marijuana prescribed for him by his physician is improper when the only evidence before the court was the uncontroverted medical judgment of that physician that the use of marijuana was the preferred method of treatment.

Health and Safety Code section 11362.775

The statute provides that: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570."

This provision, enacted as part of the Medical Marijuana Program Act (Stats. 2003, ch. 875) was intended, in part, to "enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." (Stats. 2003, ch. 875 sect. 1(b).) As the majority acknowledges, this legislation expanded the provisions of the Compassionate Use Act, which was narrowly drafted. One purpose of that Act, however, was "to ensure that seriously ill Californians [would] have the right to obtain and use marijuana for medical purposes . . . . (Health & Saf. Code, § 11362.5 subd. (b)(1)(A)."

The Legislature did not define, or discuss, the meaning of the words collectively or cooperatively in this context. In attempting to give meaning to those words, the majority has identified a three-part test, two parts of which find direct support in the language of the statute itself: that a defendant be a member of the collective, and that each member be either a qualified patient, a person with a valid identification card, or a designated primary caregiver. Where the test departs, however is in the imposition of a requirement that some undefined, but "significant," number of the members perform some tasks related either to cultivation or other activities supporting the operation of the cooperative. I do not believe that either the language or the grammatical structure of the statute supports that requirement.

The additional element, while critical to the defense, is undefined as to its nature and scope. This uncertainty provides no guidance to prosecutors, defendants, or the trial courts. The effect of that uncertainty concerning the scope of any such requirement and the evidence required to establish the defense is to limit, not enhance, the access of patients to medical marijuana. As a result, it defeats the stated intent of the Legislature.

Even if the additional element were required by the statutory language, appellants should be given the opportunity to present evidence to meet it. There is no question on this record that the appellants were prepared to present testimony of the qualification of the members, the fact of the formation of the collectives (association) and the purpose to provide a mechanism for the cultivation of marijuana for the use of the collective, but no others. The offer of proof made prior to the court's ruling that the defense would not be allowed was brief and general. In the extensive discussion between court and counsel that followed, the issue of the activities of the members of the cooperative was not raised, despite the fact that even the limited offer made included the fact that the owner-operators of the two collectives were prepared to testify about their business. Appellants had no notice of this additional requirement nor, on the record before us, can we

determine what evidence the appellants were prepared to, or could have been prepared to, present on this issue.[1]

At the time appellants came to trial, there was no law providing guidance as to what, if any, evidence was required; they were deprived of the opportunity to present the defense that the majority's test would permit.

The Probation Condition

The probation condition precluding the use of marijuana by appellant Newcomb was the subject of a modification motion at which the prescribing doctor was the only witness. He testified to his medical opinion that, while there are other drugs that could help appellant's medical condition, he had no basis to conclude that they would be either as well-tolerated or as effective. The court, concerned that appellant was involved in a large scale criminal growing operation, concluded that appellant should be required to try alternative treatments, and denied the modification, despite its conclusion that the doctor's testimony was credible. In doing so, the court appeared to be making a medical judgment as to the safety and efficacy of such alternative treatments without a record establishing either. As a result, although the condition was, as the majority points out,

[1] No party before this court cites to, or discusses, any other case that suggests the test established in this case. The majority relies, in part, on *People v. Uriziceanu* (2005) 132 Cal.App.4th 747. *Urizceanu*, like this case, arose from the refusal of the trial court to permit a defense by a grower defendant. After trial, but before appeal, the Legislature adopted the Medical Marijuana Program Act, as a result of which the court remanded the matter for a new trial in which defendant could assert this defense. The record before that court demonstrated that defendant had evidence relevant to a defense under Health and Safety Code, section 11362.775. Specifically, he presented evidence that he was a qualified patient, and of the policies and procedures of the cooperative, as to verification of member eligibility, member payment of costs and member volunteer activities. (*People v. Uriziceanu, supra,* at p. 786.) As to the last category, the opinion indicated that a small number of the members of the cooperative provided limited volunteer services. (*Id*. at pp. 763-766.) The court did not specify the number of members who provided services, nor, in remanding the matter to permit the defendant to present evidence relevant to the defense, did it suggest that such activity was a required element of the defense.

related to the crime for which he was convicted, the court found itself in the position of making a medical judgment on a record that did not support that judgment. I would remand for a hearing in which the court could be provided with a record sufficient to make an adequate finding.

ZELON, J.